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No. 87-1174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

APPLICATION OF STERLING BANCORP,

Appellant,

v.

NEW YORK CITY DEPARTMENT OF FINANCE
and PHILIP R. MICHAEL, Commissioner of Finance,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FIRST JUDICIAL DEPARTMENT

BRIEF OPPOSING MOTION TO DISMISS

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TABLE OF CONTENTS PAGE

A. The Financial Corporation Tax Is Imposed For The Privilege of "Doing a Banking Business". 2

B. The Nassau Branch of SNB Is "Doing A Banking Business" Outside Of The United States 3

C. The Discrimination Resulting From The Appellees' Interpretation Of The Financial Corporation Tax Law Is Impermissible Under The Equal Protection Clause. 4

D. The Constitutional Questions Involved Herein Were Previously Raised In The Intermediate Appellate Court 6

TABLE OF AUTHORITIES PAGE

J.D. Adams Manufacturing Co. v. Storen,
304 U.S. 307, 311 (1938). 4

Allied Stores of Ohio v. Bowers,
358 U.S. 522 (1959). 4

Douglas v. California,
372 U.S. 353, (1963) 7

Jefferson v. Hackney, Commissioner of
Public Welfare, 406 U.S. 535 (1972). 5

Ross v. Moffitt,
417 U.S. 600, 609 (1974). 7

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The Appellees have erroneously stated that the New York City Financial Corporation Tax is imposed on banks for the privilege of "doing business" when in fact the tax is imposed for the privilege of "doing a banking business" in New York City. Thus, they have completely disregarded the fact that the Appellant's subsidiary, Sterling National Bank & Trust Company of New York ("SNB"), as any national bank, can only conduct such banking business at any location that is permitted by the banking laws. Under the laws of the United States, the State of New York and the Commonwealth of Bahamas, the banking business of SNB's Nassau branch was conducted outside of the

United States pursuant to the authority of a license from Bahamas. By reason of such banking laws, it could not have done the banking business, which was conducted by such branch, in New York City or anywhere else in the United States. Accordingly, such branch is an instrumentality of foreign commerce and the income[1] thereof is subject to tax by Bahamas.

A. *The Financial Corporation Tax Is Imposed For The Privilege of "Doing a Banking Business"*

The Financial Corporation Tax is imposed on banking corporations for the privilege of "doing business" (§R46-37.1, Administrative Code of the City of New York, JS, A-3[2]) but in order to be subject to this tax, the banking corporation must be "doing a banking business". (R46-37.2(a)(3) of the Administrative Code of the City of New York, JS, A-3) Thus, the tax is imposed on banks for the privilege of "doing a "banking business" in New York City, rather than merely "doing business". It was clearly stated in the Advisory Opinion of the State Tax Commission to Lloyds Bank of California (JS, A-37) that the New York State Franchise Tax on Banking Corporations (the tax upon which the New York City tax was modelled) is imposed on banking corporations for the privilege of "doing a banking business" within the State. In this Opinion it was held that a bank "doing business" in

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[1]The Appellees, in the footnote on page 9 of their Motion To Dismiss, appear for the first time, to be questioning the amount of the income of the Nassau branch. At the formal hearing before the Appellees, their witness, the tax auditor, an experienced certified public accountant, testified that the footnote to the annual financial statements in the Form 10-K filed by the Appellant with the Securities and Exchange Commission, which set forth therein the amount of income of the Nassau branch, was in compliance with generally accepted accounting principles. No issue has, heretofore, been raised as to the amount of income of the branch.

[2]J.S. refers to Appellant's Jurisdictional Statement and number is the page thereof.

New York State was not subject to tax if it did not maintain a duly licenced branch within the state in order to do a "banking business" therein.

The Appellees agree with this principle stating that "the contemplated loan production office (soliciting loans, assembling credit information, making property inspections and appraisals) would not amount to doing a banking business in the City..." (Emphasis supplied.) (MD, 18)[3] However, they erroneously conclude that a California bank which maintains an office in New York City to perform services for its Nassau branch "...would be doing a banking business and...subject to the City tax". How can it be said that such bank is "doing a banking business" in the City when it has no license or authority to conduct a banking business anywhere in the State?[4] The in-City performance of services for an out-of-State branch, such as Nassau, is no different that the in-City performance of services by the loan production office for the out-of-State bank.

B. *The Nassau Branch of SNB Is "Doing A Banking Business" Outside Of The United States*

Under the laws of every jurisdiction involved herein, (i.e. the United States, New York State and the Commonwealth of Bahamas) but for the City of New York, the Nassau branch of SNB is conducting a banking business outside of the United States.

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[3]MD refers to Appellees' Motion To Dismiss and the number is the page thereof.

[4]As noted in footnote 9, JS8, the Appellant had called a senior officer of the New York State Department of Banks to testify as to the banking law and its applicability to out-of-state banks. Despite the fact that he had been with this agency, which is charged with the responsibility of enforcing the banking laws, for over thirty years, it was held that he did not qualify as expert on banking laws. Certainly neither the Appellees nor their counsel would appear to be an expert on the banking law to express this opinion.

Such branch is an instrumentality of foreign commerce which is doing its business under the authority of a license from the Bahamas and accordingly is subject to tax thereby. The imposition of New York City tax on the income of such branch subjects such income to the risk of multiple taxation which is a burden on foreign commerce that is prohibited by Art. 1, §8 of the Constitution. *J.D. Adams Manufacturing Co. v. Storen,* 304 U.S. 307, 311 (1938) It is for these reasons that the States of California and Washington have recognized that the Nassau branch (such as the Nassau branch of SNB) of a national bank, which was headquartered in the State, is a foreign branch. Therefore the income thereof was not be taxed by the State in which the bank was headquartered. (JS, A-39 and A-64)

C. *The Discrimination Resulting From The Appellees' Interpretation Of The Financial Corporation Tax Law Is Impermissible Under The Equal Protection Clause*

The Appellees rely on *Allied Stores of Ohio v. Bowers,* 358 U.S. 522 (1959) and several other cases (MD, 19 and 20) for the principle that a state can tax domiciliaries more heavily than non-domiciliaries. But as stated by Mr. Justice Whittaker, in his decision, at page 527:

> "But there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.' *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415; *Louisville Gas & Electric Co. v. Coleman,* 277

> U.S. 32, 37; *Airway Electric Appliance Corp. v. Day,* 266 U.S. 71, 85; *Schlesinger v. Wisconsin,* 270 U.S. 230, 240; *Ohio Oil Co. v. Conway,* 281 U.S. 146, 160. 'If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.' *Brown-Forman Co. v. Kentucky,* 217 U.S. 563. *State Board of Tax Comm'rs v. Jackson,* 283 U.S. 527, 537. That a statute may discriminate in favor of a certain class does not render it arbitrary if the discrimination is founded upon a reasonable distinction, or difference in state policy. *American Sugar Ref. Co. v. Louisiana,* 179 U.S. 89; *Stebbins v. Riley,* 268 U.S. 137, 142." (Emphasis supplied.)

This principle is similar to the "rational and not invidious" standard of *Jefferson v. Hackney, Commissioner of Public Welfare,* 406 U.S. 535 (1972). Thus, it is well settled that a state may discriminate if it is rationally related to the achievement of the purpose of the statute. However, in the instant case there is nothing in the statute to indicate an intention or policy to discriminate as between national banks which are headquartered in New York City and those headquartered elsewhere. The discrimination is due solely to the arbitrary interpretation of the statute by the Appellees and not by legislative intent or policy. Moreover, such interpretation is contrary to the interpretation of the State tax law upon which the City tax law was modelled (see Advisory Opinion of the State Tax Commission to Lloyds Bank California, JS, A37), which Interpretation was made by the State from which the City received its power to impose this tax. The discrimination involved herein, as between national banks, is

"palpably arbitrary" and violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution.

D. *The Constitutional Questions Involved Herein Were Previously Raised In The Intermediate Appellate Court*

The Appellees contend that this appeal should not be entertained by this Court with respect to the Equal Protection Clause issue, since that issue was not previously raised in the State Court and thus, the New York Court of Appeals did not expressly rule thereon.

The Appellant did raise such issue in the Appellate Division. In its Brief in that Court, on page 34, it is stated:

> "By imposing its tax on the income of NBB [Nassau Bahamas branch of SNB] in disregard of the Federal laws, which, under such laws is earned by a foreign branch from sources outside of the United States, the Respondent [the Appellees, herein] has violated the Due Process and Commerce Clauses of the Federal Constitution."

The Appellees concede that "...it will suffice to raise the constitutional issue in the brief submitted in the intermediate Appellate Court, the Appellate Division." (MD,14) Thus, the issue as to the Fourteenth Amendment to the Constitution of the United States would appear to have been timely raised. However, the Appellees seek to estop consideration of this question, contending that the mention of only the Due Process Clause of said amendment forecloses argument as to the applicability of the Equal Protection Clause thereof, by making an unwarranted distinction

between the two clauses when in fact their meaning is very similar. In *Ross v. Moffitt,* 417 U.S. 600, 609 (1974) Mr. Justice Rehnquist defined the Due Process and Equal Protection clauses indicating a difference only in emphasis. Moreover, because of the similarity of the two clauses reasonable men can differ as to applicability of one as opposed to the other. For example, in *Douglas v. California,* 372 U.S. 353, (1963) the majority predicated their opinion on the Equal Protection Clause, but Mr. Justice Harlan differed stating in his dissent, at page 361, "In my view the Equal Protection Clause is not apposite, and its application to cases like the present one can lead only to mischievous results. This case should be judged solely under the Due Process Clause, and I do not believe that the California procedure violates that provision."

The Appellant timely raised the issue as to the Fourteenth Amendment of the Constitution and there is nothing to indicate that the New York Court of Appeals did not review this issue. Accordingly, there is no reason for this Court to be proscribed from entertaining an issue relating to such Amendment.

For the reasons set forth in the Jurisdictional Statement and herein, the Appellant has shown that there are substantial Constitutional issues involved in this matter which deserve the attention of this Court.

Respectfully submitted,

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